02-0427

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IN THE SUPREME COURT OF TEXAS

WEST ORANGE-COVE CONSOLIDATED I.S.D., et al.,
Petitioners,

vs.

FELIPE ALANIS, in his official capacity as
The Commissioner of Education, et al.,
Respondents.

RESPONSE TO PETITION FOR REVIEW

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RESPONSE TO PETITION FOR REVIEW

Respondents, the Texas Commissioner of Education and the Texas Comptroller of Public Accounts, submit this response in opposition to the petition for review filed by Petitioners, West Orange-Cove Consolidated I.S.D., Coppell I.S.D., La Porte I.S.D., and Port Neches-Groves I.S.D., and would respectfully show as follows:

STATEMENT OF THE CASE

Respondents would add the following clarifications to Petitioners' statement of the case:

Disposition in the trial court: Petitioners correctly recite that the trial court dismissed on special exceptions Petitioners' claim that the $1.50 cap on local maintenance and operation taxes *has presently resulted* in a state ad valorem tax in violation of article VIII, section 1-e of the Texas Constitution. In doing so, the court assumed, for pleading purposes, that a district that is at the cap *must be* at the cap in order to provide an accredited education. But the court then found that, for the cap to create a *state* ad valorem tax, a "constitutionally significant number" of districts must be at that cap; and Petitioners did not and could not plead that such was the case. The court then went on to dismiss Petitioners' alternative claim that the $1.50 cap *will in the future result* in a state ad valorem tax on the jurisdictional ground that such claim is not ripe.

Disposition in court of appeals: The court of appeals affirmed the trial court's dismissal, but in doing so concluded that it could not assume (as the trial court had assumed) that a district that pleads that it is at the cap *must be* at the cap in order to provide an accredited education. Because the record demonstrated that Petitioners did not and could not plead that they were required to tax at the cap in order to provide an accredited education, the court affirmed the dismissal on the pleadings. The court went on to alternatively conclude that, because Petitioners did not and could not plead that they were required to tax at the cap in order to provide an accredited education, their claims were not ripe for adjudication.

STATEMENT OF JURISDICTION

This petition for review does not provide a basis for this Court to exercise its jurisdiction under TEX. GOV'T CODE § 22.001(a)(6). Although the area of public school finance has historically presented significant constitutional issues, this appeal does not. Indeed, the last time this Court addressed the State's school finance system, it not only confirmed the constitutionality of the current school finance system, it expressly resolved the one specific constitutional issue that Petitioners seek to raise in this case. *See Edgewood I.S.D. v. Meno*, 917 S.W.2d 717 (Tex. 1995) (*Edgewood IV*). More specifically, this petition simply presents issues related to pleading requirements and special exceptions practice. The court of appeals held that Petitioners' claim was properly dismissed because Petitioners did not and could not plead that they were required to tax at the $1.50 cap in order to provide an accredited education, which the court equated with the constitutional requirement to provide a "general diffusion of knowledge." Petitioners contend that they should be permitted to litigate the question of whether the provision of an accredited education meets the constitutional requirement of providing a general diffusion of knowledge. But as the trial court and the court of appeals both recognized, this Court expressly answered that question in *Edgewood IV*. This case thus presents no unresolved issues of significance to the State's jurisprudence.

ISSUES PRESENTED

Respondents disagree with the manner in which Petitioners characterize the issues that this petition presents. Pursuant to TEX. R. APP. P. 53.3(c)(1) Respondents state the issues presented as follows:

> This Court has previously upheld the constitutionality of the State's current school finance system. In doing so, the Court acknowledged that, if the cost of providing a general diffusion of knowledge increased to the point that districts were required to set their local ad valorem maintenance and operations taxes at the statutory cap of $1.50, then the districts would have no meaningful discretion and the tax would in effect become an unconstitutional state ad valorem tax. To reach that point, however, the districts must show not only that they have set their tax rate at the statutory cap, but that they were required to do so in order to provide a general diffusion of knowledge. Moreover, the Court has expressly recognized that the Legislature, within its constitutional authority, is responsible for setting the measure for a general diffusion of knowledge by setting standards for an accredited education. In light of this:
>
> 1. Did the court of appeals properly uphold the dismissal on special exceptions of Petitioners' claim that the tax has become a state ad valorem tax, because Petitioners did not and could not in good faith plead that they must tax at the cap in order to provide an accredited education?
>
> 2. Did the court of appeals properly uphold the dismissal for lack of ripeness of Petitioners' claim that the tax has become a state ad valorem tax, because Petitioners did not and could not in good faith plead that they must tax at the cap in order to provide an accredited education?

STATEMENT OF FACTS

The opinion of the court of appeals correctly states the facts. Respondents disagree, in part, with paragraphs C and D of Petitioners' Statement of Facts, and offer the following corrections:

On May 7, 2001, Respondents filed a special exception excepting "to Plaintiffs' entire petition because it fails to allege facts that would confer jurisdiction" on the district court. In the same document, Respondents urged their Plea to the Jurisdiction arguing, *inter alia*, that Petitioners' claims were not ripe because they "do not allege that the system requires them or any other district to tax at the rate of $1.50 *in order to provide a general diffusion of knowledge*. . .that is, just to provide an *accredited education*." (C.R. 0011).

On June 11, 2001, Petitioners amended their petition but did not cure this deficiency. They also responded to Respondents' plea to the jurisdiction and special exception but, as to the latter, elected to stand on their pleadings. (C.R. 0112).

On June 18, 2001 Intervenor Alvarado filed a special exception excepting that Petitioners did "not plead all the elements necessary to support th[eir] cause of action because Petitioners omitted that they were required to adopt a $1.50 tax rate in order to provide the constitutionally-required general diffusion of knowledge to their students."

On June 27, 2001, Petitioners responded to Alvarado's special exception. Again, they did not amend their pleading but instead argued that by quoting cautionary language from

Edgewood IV they had implicitly pleaded that they had to tax at or near $1.50 just to provide their students with a general diffusion of knowledge. (C.R. 202).

At the June 28, 2001 hearing on special exceptions and the plea to the jurisdiction, Petitioners' attorney resisted equating "a general diffusion of knowledge" with an accredited education, *see* Hearing Transcript at 45-51, but again elected to stand on their pleadings:

> THE COURT: Well, let me ask counsel for the plaintiffs, are you – are you – are you pleading that the – you can't provide an accredited system on $1.50 or are you pleading that the accredited system isn't good enough to provide a general diffusion of knowledge and you can't provide a general diffusion of knowledge on $1.50?
>
> MR. BRAMBLETT: All of the above. . . .We pled it. It's pretty clear what we're driving at. We're driving at Page 738 of the Edgewood majority opinion.
>
> . . . .
>
> THE COURT: Well, so what about Mr. Woods' special exception? Are you prepared to say what it costs to provide a general diffusion of knowledge?
>
> MR. BRAMBLETT: I think that it's unnecessary for the Court to grant that motion for special exception. . . . We have met our pleading obligation.

Id. at 93, 97-98.

The Court of Appeals found that "West Orange-Cove either could not or did not seek to amend its pleadings." *West-Orange Cove Consol. I.S.D. v. Alanis, et al.*, No. 03-01-00491-CV, 2002 WL 534582 (Tex. App–Austin April 11, 2002, pet. filed).[1] *See* Tab A at 13.

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[1]Hereinafter cited to as "Third Ct., Tab A."

The Court of Appeals did not hold, as Petitioners assert, "that a claim could be stated if even a single district is forced to tax at the cap." (Pet. for Rev. at 1).

Additionally, the Legislature has modified the public school finance system several times since 1995, but, as Petitioners concede, the system is basically the one that this Court found to be constitutional in *Edgewood IV*. When the Education Code was recodified, Chapter 16 became Chapter 42 and Chapter 36 became Chapter 41. The Legislature increased the basic allotment from $2300 to $2387 in 1995, to $2396 in 1997, and to $2537 in 1999. And the Legislature increased the guaranteed yield from $20.55 to $21 in 1995, and to $24.70 in 1999. The 77th Legislature raised the yield to $25.81 in 2001-02 and to $27.14 for 2002-03. *West-Orange Cove Consol. I.S.D. v. Alanis, et al.*, Modified Final Order, 345th Dist. Ct., Travis Cty., (No. GV1-00528).[2] *See* Tab B at 27.

In 1995, the Legislature authorized a $170 million Facilities Assistance Grant program to provide aid to 276 districts through a formula based on size and wealth, which supported the construction of approximately $250 million in facilities. In 1997, the Legislature authorized $200 million for a guaranteed-yield program known as the Instructional Facilities Allotment (IFA). This program provided guaranteed state aid for debt service over a period of eight years or more based on a formula that considers property wealth per student, the issuance of eligible debt, and tax effort. State aid is provided in the form of yearly support to help districts pay long-term debt service costs rather than one-time cash awards. In 1999,

[2]Hereinafter cited to as "Dist. Ct., Tab B."

the Legislature continued the IFA and guaranteed districts $35 per student in average daily attendance (ADA) per penny of tax effort for new instructional facility debt obligations. While the IFA is a guaranteed yield program, districts must apply to participate. District property wealth is the central factor in determining acceptance of a district. The IFA is a sum certain appropriation. In 1999, the Legislature also created the Existing Debt Allotment (EDA), guaranteeing $35 per penny per ADA for up to $0.12 of tax effort (more if funding is available) for old debt. Tier 2 funds can no longer be used for debt service or capital outlay. The 77th Legislature raised the guarantee to $0.29 per penny of tax effort and broadened the definition of eligible bonds. Dist. Ct., Tab B at 27-28.

Overall, the system is driven by the tax rates set by local school districts. One of the flaws of previous systems was that they "subsidiz[ed] wealthier school districts at the expense of property poor districts." *See Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 496 n.12 (Tex. 1991) (*Edgewood II*). The current system generally prohibits school districts from imposing a maintenance and operations (M&O) tax at a rate that exceeds $1.50 per $100 in property valuation.[3] *See* TEX. EDUC. CODE § 45.003(d). This cap on tax rates limits the amount of unequalized dollars in the system.

In 1997, the Legislature raised the equalized wealth level to $295,000 per weighted student in average daily attendance (WADA), and made the hold-harmless provision for

[3] The $1.50 cap does not apply to a school district's tax rate for debt (Interest and Sinking Fund, or I&S, tax rate). *See* TEX. EDUC. CODE §§ 45.001, 45.003.

certain wealthy districts (as described in *Edgewood IV)* permanent and indexed to changes in the equalized wealth level. The 77th Legislature raised the equalized wealth level to $300,000 per WADA in 2001-02, and to $305,000 in 2002-03. Act of May 28, 2001, 77th Leg., R.S., H.B.3343 § 2.02(a) (to be codified as an amendment to TEX. EDUC. CODE ANN. § 41.002). Each time the Legislature has modified the financing system it has balanced the effects of its modifications between property-poor and property-wealthy districts to preserve the efficiency of the system.

SUMMARY OF THE ARGUMENT

The district court dismissed Petitioners' lawsuit on the pleadings, and the court of appeals affirmed, applying the standards that this Court articulated in *Edgewood IV*. This petition for review does not raise unsettled questions of constitutional law. Instead, it merely raises the issue of whether the court of appeals correctly affirmed the district court's dismissal of Petitioners' lawsuit on special exceptions and a plea to the jurisdiction. It is clear from Petitioners' petition that they did not state a claim of changed circumstances from the time *Edgewood IV* was decided, so as to warrant a review of the local ad valorem school tax as a violation of article VIII, § 1-e of the Texas Constitution. It is also clear from the procedural facts that Petitioners had the opportunity to replead but choose to stand on their pleadings.

Petitioners' desire, admirable as it may be, to exceed the $1.50 cap on maintenance and operations taxes to fund their desired program of education does not state a claim for relief unless they can allege that they must tax at the cap just to provide an accredited education. Because they cannot allege that they must tax at the cap to provide the constitutionally protected level of education their claim is not ripe. Dismissal for failure to meet this pleading requirement was correct and does not warrant review by the Court.

ARGUMENT

I. This Appeal Does Not Ask the Court to Decide Unresolved Questions of Law but, Instead, Asks it to Reject Established Constitutional Standards.

In 1995, this Court in *Edgewood IV* upheld the constitutionality of the public school finance system that Petitioners challenge in this case. In doing so, the Court specifically held that, although the system requires a minimum rate of $.86 to participate in the Foundation Program and sets a maximum rate of $1.50 for local ad valorem M&O taxes, it does not deprive the districts of meaningful discretion and therefore does not in effect transform the local ad valorem tax into an unconstitutional *state* ad valorem tax. *See Edgewood IV,* 917 S.W.2d at 756. The Court thus reaffirmed and applied the Court's prior holding that:

> [a]n ad valorem tax is a state tax when it is imposed directly by the State or when the State so completely controls the levy, assessment and disbursement of revenue, either directly or indirectly, that the authority employed is without meaningful discretion.

Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 502 (Tex. 1992) (*Edgewood III*).

Against this standard, the Court in *Edgewood IV* concluded that, although the current system imposed a minimum and set a maximum rate for local M&O taxes, it does not deprive districts of meaningful discretion and therefore does not violate article VIII, § 1-e of the Texas Constitution. The Court cautioned, however, that the tax could become a state ad valorem tax if future economic changes effectively required districts to tax at the $1.50 statutory cap in order to provide the constitutionally-required general diffusion of knowledge:

> If the cost of *providing for a general diffusion of* knowledge continues to rise, as it surely will, the minimum rate at which a district *must tax* will also rise. Eventually, *some* districts may be forced to tax at the maximum allowable rate *just to provide a general diffusion of knowledge*. If a cap on tax rates were to become in effect a *floor as well as a ceiling*, the conclusion that the Legislature had set a *statewide* ad valorem tax would appear to be unavoidable because the districts would then have *lost all meaningful discretion* in setting the tax rate.

Edgewood IV, 917 S.W.2d at 738 (emphases added).

To properly understand this language, it is necessary to recognize, as the trial court and the court of appeals did, that both this Court and the Legislature have already determined that the constitutional requirement of a "general diffusion of knowledge" is measured and met by legislatively-determined accreditation standards. *See id.* at 730 (noting that the "Legislature equates the provision of a 'general diffusion of knowledge' with the provision

of an accredited education"); 731 n.10 ("accreditation standards [are] the legislatively defined level of efficiency that achieves a general diffusion of knowledge"). This is so because it is the role of the Legislature, and not the courts, to make the policy choices regarding the type of education that is necessary to provide a "general diffusion of knowledge." *See id.* at 726 (discussing the respective roles of the legislature and the courts).

Thus, to use the *Edgewood IV* Court's cautionary language as the door to another wave of school finance litigation, Petitioners must plead and prove not simply that they have set their taxes *near* the $1.50 cap, nor even that they have set their taxes *at* the $1.50 cap. Instead, they must plead and prove that the system effectively requires districts (or, as the district court found, at least a "constitutionally significant number of districts") to set their rates at the $1.50 cap *in order to provide an accredited education.*

Petitioners did not and cannot plead or prove this. Specifically, they did not and cannot plead:

- that all districts (or even a constitutionally significant number of districts) have set their M&O rates at the $1.50 cap;
- that the four plaintiff districts have set their M&O rates at the $1.50 cap; or
- that any district has set, or will inevitably be required to set, their M&O rates at $1.50 *in order to provide an accredited education.*

The district court concluded that, for pleading purposes, it would assume that any district that had set its rates at the $1.50 cap had been required to do so in order to provide an accredited education. The court of appeals correctly refused to make that assumption, and

instead recognized that, unless the districts could plead that they had to set their rates at $1.50 to provide an accredited education, they could not state any claim that the tax had become an unconstitutional state ad valorem tax.

To avoid this result, Petitioners do not contend that they should be permitted an opportunity to re-plead to assert that they must set their rates at $1.50 to provide an accredited education. Instead, they ask this Court to reconsider and now reject its clear standard for a general diffusion of knowledge: the constitutional requirement that the State provide an efficient system for the general diffusion of knowledge "means that each district must have substantially equal access to the funds necessary *to provide an accredited education.*" *Edgewood IV*, 917 S.W.2d at 730 n.9 (emphasis added); *see also id.* at 738.[4]

Petitioners have put the words of *Edgewood IV,* the words of the district court's opinion, the words of the court of appeals, and the words in the parties' pleadings in a Procrustean bed and pulled them out of shape to disguise that they cannot plead that they are without discretion to set a tax rate that will raise the money necessary for an accredited education. Although they face no risk of failing to provide an accredited education, they are limited in the type of education that *they want to provide* because of the $1.50 cap. No more, no less. While this creates budget choices for the districts and policy choices for the

[4] The Court noted in *Edgewood IV* that the evidence at trial supported a finding "that meeting accreditation standards, which is the legislatively defined level of efficiency that achieves a general diffusion of knowledge, requires about $3,500 per weighted student." 917 S.W.2d at 730 n.10. During the 2000-2001 school year, the mean cost of education among the accredited schools is budgeted to be $4,179. Schools rated exemplary budgeted $4,311 per weighted student.

Legislature, it does not state a claim of changed circumstances to reopen the *Edgewood* litigation. The petition for review should be denied.

II. Petitioners Have Not and Cannot Assert a Constitutional Claim Under the Facts of this Case to Avoid Dismissal after Special Exceptions or to Avoid Dismissal for a Lack of Ripeness.

Petitioners had plenty of opportunity to plead a viable cause of action. What they lack is a factual basis to do so in good faith. Although the district court granted an assumption for Petitioners' pleadings, it clearly acknowledged the constitutional question: "a constitutionally significant number of districts must tax at the maximum rate *to provide an accredited education*, . . .[before] they have lost meaningful discretion, and the tax has become a state ad valorem tax." Dist. Ct. Tab B at 3. Likewise, the appellate court recognized that "the allegation that a district is forced to tax at the highest allowable rate to provide the bare, accredited education is a necessary element of a cause of action brought by a district challenging the cap." Third Ct. Tab A at 15. Petitioners cannot claim that the appellate court imposed a new pleading standard that they did not have an opportunity to meet.

The district court correctly understood from the hearing that Petitioners wished to stand on their pleadings. Further, the district court determined that Petitioners could not amend to state a claim. The appellate court agreed. If a plaintiff elects to stand on his pleadings or if a plaintiff is unable to allege facts which will state a cause of action it is permissible for a court to dismiss on special exceptions without allowing amendment. *See*

Townsend v. Memorial Medical Center, 529 S.W.2d 264, 267 (Tex. App–Corpus Christi, 1975, Ref. N.R.E.) citing *Rutledge v. Valley Evening Monitor*, 289 S.W.2d 952,953 (Tex. App.–San Antonio, 1956 no writ); *Zaremba v. Cliburn, 949 S.W.2d* 822, 829 (Tex. App.–Ft. Worth, 1997, writ denied) and *Sepulveda v. Krishnan, M.D.*, 839 S.W.2d 132, 134 (Tex. App–Corpus Christi, 1992), aff'd on other grounds, 916 S.W.2d 478 (Tex. 1995). As the appellate court observed "[t]he enriched education that West Orange-Cove locally desires to provide its students is not the measure for determining if the Sate is imposing an educational mandate that requires the local district to levy a state imposed rate of tax." Third Ct. Tab A at 15.

While incorporating the requirement that Petitioners plead that they are forced to tax at the cap to provide an accredited education, the district court's pleading threshold was more elaborate because it then looked at the tax rate picture statewide. Going past Petitioners' pleading deficiency, the district court reasoned that for a plaintiff to be able to claim that the force of the $1.50 cap and the necessity of meeting the accredited standard deprived school districts statewide of meaningful discretion in setting their tax rate, it was necessary for a district to plead that a significant number of districts were at the cap.[5] The district court found that Petitioners had not done this and could not do this because 88% of the districts in the State did not have to be at the cap and were providing an education that was accredited

[5] The appellate court noted this Court's comment in *Edgewood IV*, that the system encouraged school districts to tax at or near the maximum rate, and found that irrelevant for purposes of determining whether the system imposed a state tax, unless the districts are forced to tax at the maximum to fulfill a state mandate – and accredited education. *Id.*

or better. This was a reasonable bright line pleading threshold because the court assumed that districts that were at the cap had to be there. Regardless as to whether the district court's standard was reasonable, the appellate court measured Petitioners' pleadings against a simpler standard and still found them deficient.

Further, Petitioners' lawsuit was dismissed not only on special exceptions but also on the State's plea to the jurisdiction because Petitioners did not state a ripe claim. Assuming that Petitioners could not present a claim that was ripe based on present conditions because of the undisputed facts presented on the plea, the district court further determined that Petitioners could not state a ripe claim that a sufficient number of districts would soon be at the cap under the "likely to occur" prong of a ripeness analysis because: (1) the court owes deference to the Legislature's determination that taxes up to $1.50 are adequate to fund an accredited education; (2) the Legislature can fix a problem that is "likely to occur;" and (3) the presumption that co-equal branches of government will do their duty is strong. Dist. Ct. Tab B at 26 The appellate court affirmed the dismissal for lack of jurisdiction, holding that "the claim is unripe because the appellants have failed to demonstrate that they are forced to set their rates of tax at the maximum allowable rate just to provide an accredited education." Third Ct. Tab A at 21. Petitioners failed to make this allegation because the facts do not support it.

Petitioners' claims are at best anticipatory and depend on the occurrence of contingent future events that may not occur as anticipated or at all and were properly dismissed.

Patterson v. Planned Parenthood of Houston and Southeast Tx., Inc., 971 S.W.2d 439, 444 (Tex. 1998). If a court does not dismiss an unripe claim it is engaging in the impermissible practice of rendering advisory opinions. *Id.* at 442.

Whether one looks at the big statewide picture as did the district court or focuses on the simple but necessary allegation required by the appellate court, Petitioners did not and cannot plead a viable claim. They thus are left arguing that they should be given the opportunity to conduct discovery and litigation on the issue of whether an accredited education provides a general diffusion of knowledge. But this Court has already recognized that this is a policy question for the Legislature, and not the courts, to decide: "[D]istricts must have substantially equal access to funding up to the legislatively defined level that achieves the constitutional mandate of a general diffusion of knowledge. Under the system established by the Legislature in Senate Bill 7, this means that each district must have substantially equal access to the funds necessary to provide an accredited education." *Edgewood IV,* 730 and n 9. Petitioners did not and cannot plead that they are forced to tax at the cap in order to provide an accredited education. No amount of repleading (or even discovery) would change that. The district court and court of appeals correctly held that, under such circumstances, dismissal was proper. There is no significant issue for this Court to review and the petition should be denied.

CONCLUSION

The decision of the district court to dismiss Petitioners' claims on the pleadings and the appellate court's determination to affirm that dismissal does not require review by this Court. Such dismissal applied pleading standards reflecting the Court's *Edgewood IV* decision and this appeal presents no unsettled questions of constitutional law. Petitioners stood on their pleadings and failed to plead a claim for relief because they were unable to meet the pleading standard. Furthermore, the facts pled by Petitioners do not allege a ripe claim. This Court should deny Petitioners' petition for review.

PRAYER

For the reasons stated in this response, Respondents ask the Court to deny the petition for review.

Respectfully submitted,

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